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Albert P. Nielson and Ben H. Davis, et al v. Industrial Commission of Utah et al : Plaintiffs' Petition for Rehearing and Supporting Brief

Utah Supreme Court

7684

Case No. 7684

IN THE SUPREME COURT
of the
STATE OF UTAH

ALBERT P. NIELSON and BEN H. DAVIS, a co-partnership, doing business as DAVIS NIELSON CONSTRUCTION COMPANY, and CONTINENTAL CASUALTY COMPANY, a corporation,

Plaintiffs,

— vs. —

INDUSTRIAL COMMISSION OF UTAH, KEITH F. HUBBARD, WESTERN ASBESTOS COMPANY, a corporation, and THE STATE INSURANCE FUND,

Defendants.

PLAINTIFFS' PETITION FOR RE-HEARING AND SUPPORTING BRIEF

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AUTHORITIES

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Come now the plaintiffs above named and respectfully petition this Court for re-hearing in the above entitled matter:

1. The Court misconstrued the findings of the Industrial Commission, failed to give effect to the uncontradicted testimony and by a process of its own reasoning made findings and conclusions at variance with those of the Industrial Commission.

2. The Court erred in affirming the award of the

Industrial Commission upon the grounds stated in the decision herein.

3. If it is desired to affirm the award of the Industrial Commission, the rule of law heretofore prevailing in this state should be rejected and a definite rule announced in accordance with the law hereafter to be applied, in order to avoid confusion and as a definite guide to the Industrial Commission, employees, employers, and their insurance carriers.

In support of the foregoing petition, plaintiffs present the following:

BRIEF OF PLAINTIFFS SUPPORTING THEIR PETITION FOR RE-HEARING

STATEMENT OF FACTS

This case is before this court on writ of certiorari to the Industrial Commission to review an award against the plaintiffs and in favor of the defendants. This court affirmed the award of the Commission and plaintiffs believe that the decision of this court upon the grounds set forth therein is wrong and will tend to create future confusion in the handling and disposition of similar cases. In this case there is no hardship upon the employee either by reason of the appeal from the Industrial Commission or by reason of this petition for re-hearing. The employee concededly is entitled to compensation either from the plaintiffs or the State Insurance Fund and pending the final determination of this case is being paid. The State Insurance Fund initially paid compensation, which was

later continued by the plaintiff Continental Casualty Company after the award of the Industrial Commission. There is, therefore, no urgency upon the part of the employee in this case, but there is urgent reason for a reconsideration by this court of its decision as we shall attempt to point out in our argument. The points of the argument will be discussed in the same order, set forth above in the petition for re-hearing.

ARGUMENT

I.

THE COURT MISCONSTRUED THE FINDINGS OF THE INDUSTRIAL COMMISSION, FAILED TO GIVE EFFECT TO THE UNCONTRADICTED TESTIMONY AND BY A PROCESS OF ITS OWN REASONING MADE FINDINGS AND CONCLUSIONS AT VARIANCE WITH THOSE OF THE INDUSTRIAL COMMISSION.

In its decision, the court makes various assertions as to what the Industrial Commission found or must have found, which do not actually reflect the findings of the Commission and which are not supported by the record. For instance, in the 3rd paragraph of the decision, the court says "It is obvious that the Commission concluded that no herniation of the lumbosacral disc occurred at the time of the first strain, but that such herniation did occur at the time of the second." Actually the Commission found that "applicant's injury of October 24, 1949 did such damage to his lumbosacral disc that degeneration began." (R. 82) Also, "the referee, therefore, finds that the condition *resulting* from applicant's injury

of October 24, 1949, was aggravated, * * * by his injury of July 18, 1950." Degeneration is one of the processes of herniation. Herniation is the protrusion of an organ or a part thereof through the opening in the walls of its natural cavity.

The testimony of all the doctors, including Dr. Robinson, is positive that the herniation commenced with the first injury. Dr. Robinson when pressed on cross examination as to what is the cause of the pain stated, "when the disc ruptures a portion of the substance extrudes and presses on the nerves in the spinal canal." (R. 54) The pain itself is the evidence of the rupture. Dr. Holbrook, (R. 63-64) testified that even if the patient, after the first accident and injury, had recovered to the extent that he had no pain, the doctor would still be of the opinion that the first accident was the cause of his hernia; that he could have been normal between the two accidents and his opinion would still be the same, to wit: that the herniation or degeneration was initiated by the original injury and further aggravated by the second injury. (R. 59) Dr. Holbrook also stated that he would still be of this opinion even if the patient suffered immediate and severe pain after the second accident because, "we know that one of the characteristics of herniated discs is that they may have pain in their backs and that may subside and they may be symptom-free and the period may vary between weeks and years until the patient will have more symptoms."

Q. "What happens to the disc itself in those periods?

A. "Apparently the disc protruded somewhat and

pressed on the nerves and then the pressure is relieved by the extruded material where it no longer interferes with the nerve roots." (R. 64) The record is quite clear that the protrusion of the disc material causes pain and that that is a characteristic of "herniated discs." There is no question from the record that the employee sustained a herniation of the disc by the first injury which later subsided when the extruded material no longer interferred with the nerve roots, and that the second injury aggravated the already existing condition. Obviously the facts in this case are different than *Ætna Life Insurance Company v. Industrial Commission,* 64 Utah 415, 231 Pac. 442, because in the *Ætna* case, it was expressly pointed out that no hernia resulted from the first accident, that there had never been any protrusion.

There was protrusion in this case, there was herniation. The period of pain between the time of the accident and the time a doctor was consulted is almost identical in both accidents. Thus, the Court is in error in saying that the Commission concluded that no herniation occurred at the time of the first strain because the Commission expressly found that there was damage and degeneration and "that the condition resulting from applicant's injury of October 24, 1949 was aggravated." There is an express finding of a condition created or caused by the October 24 injury, and that this condition was later aggravated.

The court in its decision also says that the Commission did not treat the second injury as a recurrence of an existing first injury. We respectfully submit that

the express language of the Commission's findings is that the second accident caused a recurrence of an existing condition. It is impossible to aggravate a condition if the condition never existed. It is impossible for the first injury to "result in a condition" that was aggravated by the second injury without the second injury being a recurrence of the first.

The court, also, confuses injury with disability. There may be an injury with no disability, but it is not the occurrence or onset of disability that determines either the right of the employee to compensation or the person who is liable for such compensation. Our statute provides that the factor creating liability is the accident causing the injury, not the accident causing the disability, 42-1-43. That is the whole theory of the cases similar to the *Continental Casualty Company v. Industrial Commission,* 63 Utah 59, 221 Pac. 852, relied upon by the plaintiffs in this case. In most, if not all, of the cases holding the first employer liable for a recurrence by a second accident of an injury incurred while in the employment of the first employer, the disability from the first accident had ended, and the second accident caused another disability. Nevertheless, the first employer is held liable as the one who caused that injury in the first instance. So that the fact that the disability in the present case was precipitated by the second injury is immaterial under those cases. And if the court is going to follow the *Continental Casualty* case, this case comes squarely under it. If this court is not going to follow the

Continental Casualty case, then the decision should so state so that confusion will not result.

In the decision herein, the court says, "the award itself, placing the risk on the second employer and its carrier, also is consistent with the rejection of the recurrence idea." Of course, we cannot follow that reasoning because the Commission squarely said that the July 18 injury, that is the second injury, was an aggravation of the condition that resulted from the first injury. The Commission not only found that there was a first injury, (which commenced the degeneration or herniation) but also squarely found that the second injury was an aggravation of the first. Where the Commission went wrong was in applying the aggravation theory to this case. The statement of the Commission that the "aggravation theory is too well established to require extended comment" is not a mere gratuity, as this court holds, but was the very basis and foundation of the Commission's decision. The Commission squarely found, and the language of the decision itself in this case shows, that the second injury was a recurrence of the first. The Commission in stating that the herniation or extrusion was percipitated by the second injury found contrary to the evidence as we have already pointed out, which is that the extrusion caused the pain suffered in the first injury and the pain subsided when the pressure was relieved by the extruded material. (R. 54) As we have shown, even Dr. Robinson says that a herniated disc is what causes the pain; that the rupture is a portion of the substance extruding and pressing on the nerves in the spinal canal.

Herniation is not a single event. Herniation is a process that proceeds either to clear up without surgical relief, or progresses to the point where surgical relief is necessary.

In the present case, everybody, including Dr. Robinson, when he was pinned down as above indicated, stated that the herniation began with the first injury. Whether or not it would have proceeded to completion without the intervention of the second accident was not demonstrable. But, all the expert testimony was that the condition which was surgically corrected began with the first injury.

As above indicated, we submit that the decision is in error: (1) in assuming that the Commission's award on the aggravation theory was gratuitous (2) that it is the one who is the employer at time of disability instead of the one who is the employer at the time the injury is caused who is liable, and (3) that herniation was a single event, instead of a progressive condition. The court in stating that we say that the first accident caused the disability is in error. There is no question that the disability occurred after the second accident. What we contended was that the accident which caused the injury was the first accident.

We, therefore, submit that the decision erroneously reflects the findings of the Commission and is also contrary to the evidence and to the *Continental Casualty* case, supra.

II.

THE COURT ERRED IN AFFIRMING THE AWARD OF THE INDUSTRIAL COMMISSION UPON THE GROUNDS STATED IN THE DECISION HEREIN.

We have tried to point out that this case is not similar to the *Ætna* case, because in the *Ætna* case, there had never been any degeneration or herniation as a result of the first accident. We have, also, tried to point out that as in the *Continental Casualty* case, supra, the fact that the effects of the first injury had subsided and that the second accident caused the disability is not the factor that determines liability; that under the law of this state as it has heretofore existed liability is determined by the accident that causes the initial injury; that accident is the proximate cause and all other accidents affecting the same injury are recurrences or aggravations, (aggravation is the same thing as recurrences) and the fact that disability results from a subsequent accident does not determine which employer is liable. Therefore, if the *Continental Casualty* case is to be a law in this state, the decision in this case is wrong.

III.

IF IT IS DESIRED TO AFFIRM THE AWARD OF THE INDUSTRIAL COMMISSION THE RULE OF LAW HERETOFORE PREVAILING IN THIS STATE SHOULD BE REJECTED AND A DEFINITE RULE ANNOUNCED IN ACCORDANCE WITH THE LAW HEREAFTER TO BE APPLIED IN ORDER TO AVOID CONFUSION AND AS A DEFINITE GUIDE TO THE INDUSTRIAL COMMISSION EMPLOYEES, EMPLOYERS, AND THEIR INSURANCE CARRIERS.

The plaintiff, Continental Casualty Company ever since the decision in the *Continental Casualty* case has paid similar claims to the one herein involved where it was the carrier for the employer at the time of the first accident. So far as we are concerned we have considered the law settled in this state. We have made no opposition to claims where we were the first carrier. If we are now also to be held for the second accident, then, of course, we are placed in a position where we must contest every claim, as there is no certainty which way the Industrial Commission will rule. If it is desired to hold the one liable who is the employer when the disability occurs, then a different rule should be announced so that there will be no uncertainty. The compensation laws were designed, as this court has held so many times, to require industry to bear the burden of the damage it causes, and if it is the employer at the time the actual disability occurs who is the one who causes the actual industrial loss, then we submit this court should place its decision squarely upon that ground, and overrule the *Continental Casualty* case, so that we will no longer be plagued with hair-line distinctions or whimsical opinions of the Industrial Commission.

CONCLUSION

We submit that the decision as it now stands is wrong and that a re-hearing should be granted.

Respectfully submitted,

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